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No. 90-1653

In The

Supreme Court of the United States

October Term, 1990

NOR-WEST CABLE COMMUNICATIONS PARTNERSHIP,

Petitioner,

vs.

CITY OF ST. PAUL and CONTINENTAL CABLEVISION OF ST. PAUL, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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Petitioner, Nor-West Cable Communications Partnership submits this reply in support of its petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

THE PETITION RAISES NOVEL AND IMPORTANT ISSUES FOR DETERMINATION.

Petitioner submits that several important, unsettled issues are presented for determination by this case, thus justifying grant of the Petition. These issues include clarification of the "independent review" required in free speech cases[1] (including whether the district court, as well as the appellate court, must conduct such a review in a jury case)[2], and whether "standing" to obtain judgment in an action is appropriately determined by submitting to the jury special verdicts questioning whether a potential First Amendment speaker actually desires to engage in the speech for which authorization is sought, and declining to rule upon the merits if the jury responds in the negative.

However, the issue of the greatest import raised by this case is the question of First Amendment limitations on municipal power over cable television. Petition at

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[1] *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

[2] *Compare*, the decision of the Eighth Circuit below (App. 1, pp. 8-9), with *Reveley v. Berg Publications, Inc.*, 601 F.Supp. 44, 46 (W.D. Tex. 1984); *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F.Supp. 1240, 1245 (N.D. Ill. 1986), *aff'd in part, and rev'd in part, on other grounds*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

16-21. In particular, this case presents a fully developed factual record upon which to assess the validity of "contractual franchising" of cable television and to set forth the appropriate boundaries on municipal power to limit the number of cable television speakers.[3]

The Damage to Individual Constitutional Rights

Petitioner contended below, and continues to contend before this Court, that the individualized selection procedure utilized by the City, designed to result in a negotiated contract with one and only one cable speaker, and with no further authorizations issued, is inconsistent with First Amendment principles. Rather, Petitioner contends, the City should seek to meet all of its legitimate interests through the enactment of non-discriminatory requirements, applicable to all would-be cable television operators. *See, Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1409 (9th Cir. 1985), *aff'd*, 476 U.S. 488 (1986) ("the City must content itself with uniformly applying to all applicants regulations tailored to minimize the burden on public resources and granting

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[3] *Compare, Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) ("economic scarcity" rationale sufficient basis for City to issue only one cable franchise) with *Century Federal, Inc. v. City of Palo Alto*, 648 F.Supp. 1465 (N.D. Cal. 1986) (contra). *See also, Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (economic scarcity not permissible basis for regulation of the press); *Leathers v. Medlock*, ___ U.S. ___, 113 L.Ed.2d 494, 502 (1991) (cable television is engaged in speech under the First Amendment, and is, in much of its operation, part of the "press").

franchises to all cable operators who are willing to satisfy the City's legitimate conditions.").

An individualized selection process such as was utilized by the City of St. Paul places the local governmental body in the position of choosing which speaker is "best" by evaluating numerous subjective items (App. 12, pp. 222-25), specifically including programming information (*id.*, pp. 250-64). Moreover, the auction-type procedure utilized is designed to extract contractual commitments (*id.*, pp. 193-94) from the cable speaker ultimately selected as meeting the desires of the City (*id.*, pp. 189-94, 197-98, 199-200, 202-09, 212-15). The City's franchising document makes it quite clear that the City will not select a would-be cable speaker who objects to any of the City's "desired" items. Thus, prospective cable speakers are presented with a choice: either agree to all municipal demands, whether constitutional or not, or forever lose the opportunity to engage in cable speech. The contractual element tends to add permanence to the constitutional defect. *See, Paragould Cablevision v. City of Paragould, Arkansas*, 930 F.2d 1310, 1314-15 (8th Cir. 1991) (by entering into franchise agreement, cable company bargained away free speech rights and cannot later assert them).

Bearing in mind the never-ending "needs" of local government for funds and facilities, and the almost universal desire of local elected and appointed officials to avoid public criticism by the device of influencing the press, the contractual franchising process effectively mandates the denial of First Amendment rights to thousands of incumbent cable operators, and to all those who could

otherwise enter the field and provide competition in the commerce of cable television.

The Damage to the Democratic Process

Because cable television does clearly involve electronic publishing, the "commerce" of cable television necessarily involves the "commerce of ideas", and those ideas include reporting and comment about those seeking electoral offices and the bureaucracy created and controlled by those elected. No other medium has the capacity to report on and about local government and local affairs comparable to that of cable television; and, conversely, no other medium, when it is so motivated, has a comparable capacity to create local "name recognition" and "charisma" for those who would be anointed by the ballot box.

The existing contractual franchising process not only denies the public the benefit of fair reporting and comment, but rewards those incumbent monopoly cable operators who become toadying image makers for local functionaries by allowing them to share in the monopoly profits resulting from the artificial barriers to competition.

The print medium provides Pulitzer prizes for those who expose malevolence in government. The National Cable Television Association provides Ace awards for those whose product is designed to "puff" the public perception of local functionaries with saccharine sweet coverage.

There are few ills of the cable industry that cannot be cured with competition. The first step towards the realization of that competition is to remove the artificial barriers created by local government.

This case provides that opportunity.

PETITIONER DOES NOT SEEK AN ADVISORY RULING

Far from requesting an "advisory opinion", as suggested by the brief in opposition, Petitioner seeks a ruling on the merits of its claims *because* it believes that consideration of the merits demonstrates the incorrectness of the lower court's rulings denying it standing in this action. That is Petitioner's concern. The Court's concern, Petitioner suggests, may be to utilize this case and the exhaustive trial record underlying it, to settle the conflicting decisions on the First Amendment and municipal franchising of cable television.

Petitioner requested a ruling on the constitutionality of the City's franchising requirements from both the District Court and the Court of Appeals, and now presents that request to this Court, for an obvious reason: If, as Petitioner believes, many of the requirements which the City obtained through its contractual franchise with Continental cannot constitutionally be imposed upon Nor-West, that would dramatically affect the cost of Nor-West's potential system. This, in turn, would have had (and should have had) a direct impact upon the evaluation by the jury and/or the District Court as to Petitioner's intent and ability to finance and construct

such a system.[4] This is particularly significant given the phraseology of Petitioner's original requests to the City for a second franchise, which sought authorization "on terms at least as favorable as the terms and conditions of the franchise recently issued by the City to Continental Cablevision . . . ", *but* noted that Petitioner was offering only "to meet the lawful requirements contained in the franchise issued to Continental Cablevision." App. 16, pp. 429-30; *id.*, pp. 431-32.

At trial, counsel for the City repeatedly mischaracterized Petitioner's requests as proposals to build a system identical to Continental's. *See, e.g.*, App. 11, pp. 175, 176, 179, 179-80.[5] Yet, the key to Petitioner's requests was their caveat as to the lawfulness of any terms and conditions imposed by the City. By failing to provide guidance to the jury as to the lawfulness of those requirements, and by itself adopting the jury's special verdict responses as its own findings of fact without ever reaching the merits of the lawfulness of those requirements (App. 2, p. 5), the District Court in essence simply excised this critical caveat from the case. A ruling on the merits of Petitioner's

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[4] *Compare, e.g.*, the closing argument to the jury by the City's counsel, excerpted in Appendix 11 to the Petition, wherein it is noted that the system design proposed by Petitioner's trial experts under the assumption that at least some of the City's impositions on Continental would not be required of Nor-West, ranged in cost from $19 million to $25 million (App. 11, p. 180), compared to the $43.5 million cost incurred by Continental (*id.*, p. 176).

[5] Indeed, the City continues to make the same mischaracterizations to this Court. Brief in Opposition at 3.

claims, if at least partly in Petitioner's favor, would likely lead directly to injunctive relief and/or a damage award depending upon reassessment of the facts once constitutional limits are known.

In short, the constitutionality of the City's restrictions on cable speech *was* properly at issue below and is properly before this Court. The decisions below, which denied Petitioner standing without considering the issue in the context of proper constitutional limits on City franchising were erroneous. While this Court *could* grant this Petition and remand the matter for proper consideration by the District Court or the Court of Appeals, with guidance from this Court (Petition at 2, ¶5), the Court could also determine that this case is an appropriate one to resolve unsettled and conflicting questions relating to municipal franchising and regulation of cable television speech.

THE BRIEF IN OPPOSITION MISCHARACTERIZES PETITIONER'S POSITION BELOW AND MISSTATES CERTAIN EVIDENCE.

A. The Brief in Opposition incorrectly states: "As the Eighth Circuit accurately noted, Nor-West's partners' collective net worth was $31 million at the time of its request, not $76 million. Nor-West III, Pet. App. 11." Brief in Opposition at 4 n.6. This assertion is flatly incorrect, both as a characterization of the Eighth Circuit opinion and in fact.

The accurate facts are set forth in the Petition (Petition at 5) and the Eighth Circuit opinion (App. 1, p.11). Petitioner's net worth in 1983 *was* $76 million. However, due to the long delay and significant expense in bringing

the action to trial[6], by the time of the 1988 trial several partners had withdrawn. The remaining partners still had net worth of about $31 million in 1988. RT 110, 4153. Further, at least one of the former partners testified as to his willingness to rejoin the partnership if authorization to build a competing cable system could be obtained. RT 2398.

B. The Brief in Opposition incorrectly describes Petitioner's challenge below as

> limited to the City's refusal to issue a franchise "to operate a cable television system . . . on the same terms and conditions as Continental." Amended Complaint, ¶40, R. 33.

Brief in Opposition at 15.

The quoted portion is taken from Petitioner's equal protection cause of action, which did indeed focus upon the City's differential treatment of similarly-situated cable television operators (*i.e.*, a franchise was issued to Continental, but not to Nor-West). However, the Brief In Opposition omits reference to the allegations contained in the First Amendment cause of action. In particular, ¶53 of the amended complaint notes objection to the numerous requirements extracted by the City through its auction franchising process. App. 10, p.118.

C. The Brief in Opposition asserts that "Nor-West expressly disavowed any facial constitutional challenge to the franchise ordinance (*e.g.*, 8/14/86 Tr. 34-35)." *Id.*

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[6] By the time of trial, Petitioner had spent in excess of $1.5 million on the lawsuit. RT 162.

(footnote omitted). At best, this assertion is grossly misleading. The transcript excerpt relied upon relates only to a single, narrow position, *i.e.*, that neither the Minnesota Cable Communications Act (Minn. Stat. ch. 238 (1983)), nor the Federal Cable Communications Policy Act of 1984 (47 U.S.C. §521 *et seq.*) *mandated* exclusive franchising, and hence were not facially invalid *on that ground. See, Preferred Communications, Inc. v. City of Los Angeles, supra,* 754 F.2d 1411 n.11. Rather, Petitioner's challenge below was (and remains) focused upon the procedures utilized and requirements imposed by the City of St. Paul in issuing (and refusing to issue) cable television authorizations. As a factual matter, the City had made the decision to issue only a single franchise in 1982 (RT 1217, 1285-87). Since the extensive (and in Petitioner's view, largely unconstitutional) requirements imposed upon Continental were imposed through a contractual agreement rather than through generally-applicable ordinances (*see,* Appendix 12 at 193-94), and because the City refused to inform Petitioner of the requirements which the City would seek and/or demand from Petitioner in issuing a second cable authorization, it remained unclear what "requirements" were even relevant to Petitioner's desires. Nor-West envisioned the solution to this dilemma being an injunction requiring the City to issue authorization to Petitioner with whatever requirements the City believed appropriate, followed by particularized Court review of those requirements as appropriate.[7]

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[7] *See, Century Federal, Inc. v. City of Palo Alto,* 648 F.Supp. 1465, 1478-79 (N.D. Cal. 1986) (court holds monopoly franchising unconstitutional), *later decision,* 710 F.Supp. 1552 (N.D. Cal.

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Unfortunately, as is detailed in the Petition (Pet. 9-14, 21-24), the trial court "put the cart before the horse" by denying Petitioner standing based upon special verdict responses provided without judicial guidance as to which of the requirements imposed on Continental could validly be imposed upon Petitioner.

D. The Brief in Opposition asserts that Petitioner's original complaint "sought the invalidation of Continental's franchise and the issuance of the single franchise to itself." Brief in Opposition at 3 n.4. Once again, this statement is misleading at best. The original complaint specifically prayed that Continental not be issued a franchise "unless and until a CATV franchise is granted to the plaintiffs." App. 9, p.102. Obviously, Petitioner was not demanding issuance of a monopoly franchise.

CONCLUSION

For the foregoing reasons, Petitioner requests issuance of a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Dated this 18 day of June, 1991.

Respectfully submitted,

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1987) (court subsequently reviews the major requirements that cities sought to impose on all cable franchisees).